Supreme Court, U. S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-83

HENRY W. MEERS,

Petitioner,

vs.

SUNDSTRAND CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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Respondent Sundstrand Corporation ("Sundstrand") represents to the Court as follows in response to the petition for a writ of certiorari filed by Henry W. Meers ("Meers"):

On July 18, 1977, the mandate of the United States Court of Appeals for the Seventh Circuit was issued in this action. Pursuant to that mandate, on July 21, 1977, the United States District Court for the Northern District of Illinois, Eastern Division, entered judgment in the amount of

$531,273.80. On that date, one of Meers' co-defendants, Sun Chemical Corporation, paid that amount to Sundstrand.

Contemporaneously with the filing of this Memorandum, respondent herein has filed a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit insofar as that judgment ordered a reduction in the amount of damages recoverable by Sundstrand from defendants-respondents Sun Chemical Corporation and the executors of the estate of John B. Huarisa. (The District Court had previously rendered a judgment in favor of Sundstrand Corporation and against all defendants in the amount of $4,434,786, plus prejudgment interest.) Since petitioner herein, Meers, is not a respondent to the petition filed by Sundstrand, no judgment can be entered against Meers in excess of the amount already paid to Sundstrand by a defendant other than Meers. Therefore, there is no continuing controversy or adversity of interest between petitioner Meers and respondent Sundstrand. Accordingly, respondent suggests that the instant petition is moot and should be dismissed.

Further, even if the case is not moot as a matter of law, the Court should not grant certiorari. Because of the lack of genuine controversy between Meers and Sundstrand, the issues raised would not be presented in a true adversarial context. Therefore, even if the questions presented by Meers' petition would otherwise merit review, Meers' case is not an appropriate vehicle for Supreme Court action.

Question No. 2 of the petition of Meers presents questions of law similar to those raised by Question No. 2 of the petition of Sundstrand filed simultaneously with this Memorandum. Since Sundstrand has presented those questions in an adversary context with the respondents to Sundstrand's petition, those questions can be considered by this Court without granting Meers' petition or otherwise involving him in proceedings before this Court.

Therefore, the petition should be dismissed as moot, or, in the alternative, the petition should be denied.

Respectfully submitted,

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petitioner's reply brief

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Without citing any authority for its position, respondent opposes the petition for a writ of certiorari on the ground that the case is moot because, *after* the petition was filed, one of petitioner's co-defendants paid the joint and several money judgment of $531,273.80 entered by the trial court after remand from the Court of Appeals. The case is not moot, in spite of the fact that respondent is not seeking and can no longer obtain any monetary or other relief from petitioner.

I.

The Case Is Not Moot.

This Court has held on numerous occasions that a case is not mooted by intervening events pending appeal or certiorari, even when those events remove substantial aspects of the controversy between the parties, so long as legal consequences can still emanate from the judgment that has been appealed. *E.g., Bank of Marin* v. *England,* 385 U.S. 99 (1966); *Carroll* v. *Princess Anne,* 393 U.S. 175 (1968); *Sibron* v. *State of New York,* 392 U.S. 40 (1968).*

In the case at bar, petitioner was found jointly liable to respondent in the sum of $531,273.80. That finding of liability was erroneous since it was based upon incorrect legal standards. Yet, as long as the judgment, though paid, still stands, it provides a possible basis for a claim for contribution against petitioner by Sun Chemical Corporation, petitioner's co-defendant who paid the judgment. Counsel for Sun Chemical have advised counsel for petitioner that Sun Chemical intends to seek contribution from petitioner. Thus, severe collateral legal consequences may flow from the erroneous judgment.

In just such a situation, in *Bank of Marin* v. *England,* 385 U.S. 99 (1966), this Court held that a case was not moot. There, a trustee in bankruptcy obtained a joint money judgment against a Bank and the payee of a check. The Bank appealed the finding of liability; the payee did not.

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* The "collateral legal consequences" test enunciated in *Sibron,* which was a criminal case, has been applied to civil cases. *Church of Scientology* v. *United States,* 485 F.2d 313 (9th Cir. 1973); *Justin* v. *Jacobs,* 449 F.2d 1017 (D.C. Cir. 1971); *Hudson* v. *Hardy,* 424 F.2d 854 (D.C. Cir. 1970); *Robinson* v. *Rodgers,* 481 F.2d 1110 (D.C. Cir. 1973).

Instead, the payee paid the judgment and demanded contribution from the Bank. Thus, as between the parties before the Court, the trustee and the Bank, the situation was the same as it is between petitioner and respondent —the Trustee no longer sought anything from the Bank, the Bank no longer owed anything to the Trustee and had not paid anything to the Trustee but, nonetheless, contested liability. This Court concluded that the case was not moot because the Bank was subject to a claim for contribution by the payee based on the judgment under review. Similarly, the instant case is not moot.

In addition, Sun Chemical and its predecessor (Standard Kollsman Industries, Inc.) reimbursed petitioner for his litigation expenses, including attorneys fees, from the filing of the action in 1969 until the entry of judgment against petitioner and his co-defendants on January 23, 1976, after the close of the second trial. The reimbursement was made pursuant to a Standard Kollsman by-law providing for indemnification of directors "except in relation to matters as to which it shall be adjudged in such action . . . that such . . . director . . . is liable for negligence or misconduct in the performance of his duties." Subsequent to the entry of the judgment, Sun Chemical has refused to reimburse petitioner for the substantial expenses and fees incurred in prosecuting the appeal in the Court of Appeals, and in presenting this petition for writ of certiorari to this Court.

If the judgment of liability as to petitioner is unreviewed by this Court, the practical consequence to petitioner is that he will be required to respond to a claim seeking to compel his contribution to Sun Chemical for its satisfaction of the judgment, he will be denied reimbursement of fees and expenses incurred from January 23, 1976 to date which sub-

stantially exceed $100,000,* and he may be subjected to a claim seeking to recover the several hundred thousand dollars in fees and expenses paid by Standard Kollsman and Sun Chemical between 1969 and January 1975.

It is clear that the case is in no way rendered moot by Sun Chemical's payment of the judgment.

II.

If The Court Declines To Hear The Case On The Merits, The Judgment Below Should Be Vacated.

If this Court should conclude that the case is moot or that the case will not be adequately presented due to respondent's purported lack of interest in proceeding against petitioner, the proper disposition would be to grant certiorari and then vacate the judgment of the Seventh Circuit and remand with instructions to dismiss the complaint. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

As this Court noted (340 U.S. at 39-40), that procedure preserves the rights of all parties and prevents an un-

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* The facts relating to this matter are necessarily *de hors* the record since the mootness "issue" arose after the petition for certiorari was filed. Albert E. Jenner, Jr., one of the counsel for petitioner, certifies to the Court that to his personal knowledge the facts stated as to reimbursement of fees and expenses are true and correct. Should affidavit proof be desired or necessary, they can be readily supplied from the books and records by Messrs. Jenner & Block and Henry W. Meers.

reviewed judgment from creating untoward legal consequences. Respondent, by its own admission, loses nothing, and petitioner will not be faced with any possible *res judicata* or collateral estoppel effects emanating from a judgment that has not been reviewed on the merits by this Court.

Therefore, the petition should be granted, and either the case should be heard on the merits, or the judgment of the Seventh Circuit should be summarily vacated and remanded with directions to dismiss the complaint.

Respectfully submitted,

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